

WILLIAM V. JOHNSON
JOHN W. BELL
JACK T. RILEY, JR.
BRIAN C. FETZER
THOMAS H. FEGAN
DONALD N. HOPPE
THOMAS W. MURPHY
PAMELA L. GELLEN
THOMAS J. ANDREWS
WILLIAM G. BEATTY
JOHN A. CHILDERS
ROBERT L. NORA
MARGARET A. UNGER
TIMOTHY J. MCKAY
EDWARD M. RUBIN
PAUL J. WISNER
H. PATRICK MORRIS
ROBERT A. TOWNSEND
SCOTT W. HOYNE
JAMES S. STICKLES, JR.
CORNELIUS J. HARRINGTON III
FREDERICK S. MUELLER
THOMAS MURPHY
MICHAEL B. GUNZBURG
JOSEPH R. MARCONI
CHARLES W. PLANEK
FREDERICK H. BRANDING
ROBERT M. BURKE
EDWARD D. D'ARCY, JR.
DEBRA A. DIMAGGIO
MICHAEL P. SIAVELUS

JOHNSON & BELL, LTD.

ATTORNEYS AT LAW

SUITE 2200

222 NORTH LA SALLE STREET
CHICAGO, ILLINOIS 60601

TELEPHONE (312) 372-0770
FACSIMILE (312) 372-9818

SUITE 1640

2100 MANCHESTER ROAD
WHEATON, ILLINOIS 60187
TELEPHONE (708) 510-0880
FACSIMILE (708) 510-0939

April 18, 1991

DEAN M. ATHANS
LEO G. AUBEL
KATHLEEN M. BURKE
FRANK S. CAPUANI
TERRENCE S. CARDEN
NANCY K. CARON
ROBERT J. COMFORT
GREGORY D. CONFORT
DENNIS C. CUSACK
JEFFREY W. DEER
DANIEL A. DUPRE
NANCY G. ENDERBY
PATRICIA A. FLYNN
WILLIAM A. GEISER
LAURA B. GLASER
ALAN JAY GOLDSTEIN
KEVIN J. GREENWOOD
SUSAN MARZEC HANNIGAN
VINCENT J. IULIANO
JAMES P. JOHNSTON
JANET A. KACHOYEANOS
THOMAS J. KOCH
ANDREA H. KOTT
GENEVIE F. LABUDA
BRUCE M. LICHTCSHEN
KATHRYN K. LOFT
THOMAS J. LYMAN, III
JOSEPH G. LYONS
EMILIO E. MACHADO
DAVID M. MACKSEY
JOHN L. MALEVITIS
ROBERT J. MALMROSE
MICHAEL K. MULDOON
DAVID J. O'CONNELL
BRIAN P. O'NEILL
KEVIN G. OWENS
RICHARD C. PERNA
THOMAS F. POELKING
APRIL G. PREACELY
CHARLES P. RANTIS
STEVEN I. RAPAPORT
RICHARD J. ROSENBLUM
MARK F. SCHROEDER
PAUL A. TANZILLO
GERALD T. TSCHURA
STEVEN F. WITTMAN

VIA FEDERAL EXPRESS MAIL

United States Environmental
Protection Agency
Office of Waste Programs Enforcement
Room S364/East Tower
Mail Code OS-500 USEPA
401 M Street, S.W.
Washington, D.C. 20460

Attention: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

RE: Employers Insurance of Wausau's Petition
For Reimbursement Of Costs Under 42 U.S.C.
Section 9606(b)(2)
CIW Site, Romulus, Michigan


Dear Mr. Diamond:

On behalf of Employers Insurance of Wausau, please find enclosed the "Amendments To Petition For Reimbursement," including "Amended Table 1", dated April 18, 1991. We would respectfully request that you acknowledge receipt of these documents. Similarly, we acknowledge receipt of your letter dated April 9, 1991.

Lastly, has the Agency assigned a docket number to the "Petition For Reimbursement"?

Very truly yours,

JOHNSON & BELL, LTD.


Frederick S. Mueller

FSM:jb
Enclosure

cc: Brett Warning/USEPA (w/encl.) (Via Messenger)

**In the Matter of:
CIW COMPANY SITE
ROMULUS, MICHIGAN
ADMINISTRATIVE ORDER
DOCKET NO. V-W-89-C-039**

Proceedings Under Section 106(b)
of the Comprehensive Environmental
Response, Compensation & Liability
Act of 1980, as amended, 42 U.S.C.
Section 9606(b) (2)

DOCKET NO.

Frederick S. Mueller
Daniel A. DuPre
Joseph G. Lyons
JOHNSON & BELL, LTD.
Suite 2200
222 North LaSalle St.
Chicago, IL 60601
(312) 372-0770
(FAX) 372-9818

Dated: April 18, 1991

AMENDMENTS TO PETITION FOR REIMBURSEMENT

1. Petitioner, Employers Insurance of Wausau ("Petitioner" or "Wausau"), hereby amends Section I, Paragraph 9 at page 5 of its Petition for Reimbursement, as follows:

" 9. Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that the response costs for which it seeks reimbursement are reasonable for performing the actions required by the Order, as further amended by the USEPA-approved ERAP. As set forth in Amended Table 1 (a copy of Amended Table 1 is attached hereto and incorporated herein by reference) of the RAR (Petitioner's Group Exhibit 1), Petitioner has incurred \$2,227,131.01 in costs for contractors through March 31, 1991, of which \$2,226,152.70 are reasonable response costs for complying with the Order. Petitioner has also incurred \$84,822.01 in legal fees and costs through February 21, 1991, which are reasonable costs for complying with the Order. Additional response costs will be submitted reasonably for reimbursement from the Fund."

2. Petitioner hereby amends Section V, Paragraph 12, Lines 9-10, at Pages 30-31 of its Petition for Reimbursement by adding the word "not" after the word "are" and before the word "noted".

3. Petitioner hereby amends Section V, Paragraph 13, Line 3, at Page 31 of its Petition for Reimbursement by deleting the word "and" after the word "activities" and before the word "on".

4. Petitioner hereby amends Section VI, Paragraphs 1 and 2 at Page 39 of its Petition for Reimbursement, as follows:

" 1. Petitioner requests reimbursement from the Fund for its reasonable response costs pursuant to Section 106(b)(2)(A) and (C) of the CERCLA or Section 106(b)(2)(D) of the CERCLA, and submits that the response costs for which it seeks reimbursement are reasonable for performing the actions required by the Order, as further amended by the USEPA-approved ERAP. As set forth in Amended Table 1 of the RAR (Petitioner's Group Exhibit 1.), Petitioner has incurred \$2,227,131.01 in costs for contractors through March 31, 1991, of which \$2,226,152.70 are reasonable response costs for complying with the Order. Petitioner has also incurred \$84,822.01 in legal fees and costs through February 21, 1991, which are reasonable costs for complying with the Order. Additional response costs will be submitted seasonably for reimbursement from the Fund."

WHEREFORE, Petitioner respectfully demands a hearing and requests reimbursement from the Hazardous Substance Superfund for the reasonable response costs incurred by Petitioner in complying

with the Administrative Order, Docket No. V-W-89-C-039, issued on November 28, 1989, as amended, plus interest, costs, fees and other expenses.

Respectfully submitted,

EMPLOYERS INSURANCE OF WAUSAU

By: 

Frederick S. Mueller
Daniel A. DuPre
Joseph G. Lyons
Johnson & Bell, Ltd.
Suite 2200
222 N. LaSalle Street
Chicago, Illinois 60601
(312) 372-0770
(FAX) (312) 372-9818

Dated: April 18, 1991

AMENDED TABLE 1
CONTRACTOR RESPONSE ACTION COST SUMMARY
CIW COMPANY SITE
ROMULUS, MICHIGAN
RESPONSE ACTION REPORT
FEBRUARY 1991

<u>Activity</u> <u>Descriptions</u>	<u>CWM Contract</u>	<u>Charges</u> <u>Change Order</u>	<u>CRA (1)</u> <u>Fees</u>	<u>Disbursements</u>	<u>Analytical</u> <u>Costs</u>	<u>Subcode</u> <u>Total</u>
106 Order EPA Conference/	\$0.00	\$0.00	\$35,392.75	\$4,799.87	\$0.00	\$40,192.62
ERAP Development	\$1,440,775.56	\$203,056.86	\$256,684.63	\$81,469.06	\$39,948.25	\$2,021,934.36
Order/ERAP Compliance	\$0.00	\$64,252.51	\$40,371.19	\$5,935.66	\$11,783.50	\$122,342.86
Non-PCB Drums & Containers	\$0.00	\$0.00	\$12,675.92	\$1,859.10	\$9,265.00	\$23,800.02
CIW Retained Oil Samples	\$0.00	\$7,787.95	\$2,930.88	\$978.49	\$881.25	\$12,578.57
Non-PCB Bulk Materials	\$0.00	\$0.00	\$3,291.66	\$135.09	\$0.00	\$3,426.75
Off-Site Material On-Site Restaging	\$0.00	\$0.00	\$1,252.62	\$187.33	\$437.50	\$1,877.45
Non-PCB UST (Excl T035 & T031)	\$0.00	\$0.00	\$447.47	\$5.91	\$525.00	\$978.38
Non-PCB Off-Site UST						
Contractor Totals	\$1,440,775.56	\$275,097.32	\$353,047.12	\$95,370.51	\$62,840.50	\$2,227,131.01

Notes:

(1) CRA Fees and Disbursements cumulative to March 31, 1991.

RE: CIW COMPANY SITE, ADMINISTRATIVE ORDER DOCKET NO. V-W-89-C-039

AMENDMENTS TO PETITION FOR REIMBURSEMENT

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

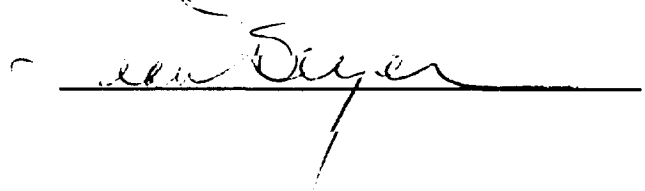
CERTIFICATE OF SERVICE

JEAN BEYER, duly sworn on oath, deposes and states that she served the above and foregoing Amendments To Petition For Reimbursement of Costs Under 42 U.S.C. Section 9606(b)(2) upon the USEPA at the following address:

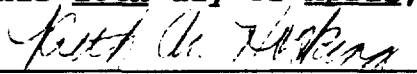
United States Environmental Protection Agency
Office of Waste Programs Enforcement
Room S364/East Tower
Mail Code OS-500 USEPA
401 M Street, S.W.
Washington, D.C. 20460

Attention: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

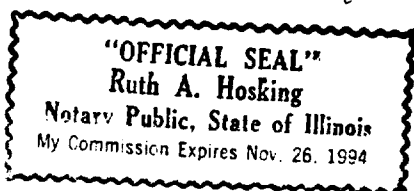
by sending a copy of the above mentioned document by Federal Express mail this 18th day of April, 1991.



SUBSCRIBED AND SWORN TO before me
this 18th day of April, 1991.



NOTARY PUBLIC



In the Matter of:
CIW COMPANY SITE
ROMULUS, MICHIGAN
ADMINISTRATIVE ORDER
DOCKET NO. V-W-89-C-039

DOCKET NO.

UNDER 42 U.S.C. SECTION 9606(b)(2)

Filed: March 22, 1991

I. JURISDICTION

1. Employers Insurance of Wausau ("Petitioner" or "Wausau"), by its attorneys, Johnson & Bell, Ltd., hereby requests reimbursement from the Hazardous Substance Superfund (the "Fund") established under Subsection A of Chapter 98, Internal Revenue Code of 1986, pursuant to Section 106(b)(2) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. Section 9601, et seq.

2. Under Section 106(b)(2)(A) and (C) of CERCLA, any person who receives and complies with the terms of any order issued under Section 106(a) may, within sixty (60) days after completion of the required actions, petition the President for reimbursement from the Fund for reasonable response costs. In order to establish entitlement to reimbursement under Section 106(b)(2)(A) and (C), the petitioner is required to establish by a preponderance of the evidence that it is not liable for response costs under Section 107(a) and that the costs for which it seeks reimbursement are reasonable in light of the action required by the order.

3. Additionally, under Section 106(b)(2)(D) of CERCLA, any person who receives and complies with the terms of any order issued under Section 106(a) may, within sixty (60) days after

completion of the required actions, petition the President for reimbursement from the Fund for reasonable response costs. In order to establish entitlement to reimbursement under Section 106(b)(2)(D), the petitioner is required to establish that the costs for which it seeks reimbursement are reasonable and that the decision in selecting the response action ordered was arbitrary and capricious, or was otherwise not in accordance with law.

4. Petitioner was named as a respondent in an Administrative Order ("Order"), Docket No. V-W-89-C-039, issued on November 28, 1989 by Basil G. Constantelos, Director of the Waste Management Division, United States Environmental Protection Agency ("USEPA") for Region V, pursuant to the authority vested in the President of the United States by Section 106(a) of CERCLA. This authority was delegated to the Administrator of USEPA on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2926 (January 29, 1987) and further delegated to the Regional Administrator, USEPA Region V, by USEPA delegation No. 14-14-C.

5. The Order, as amended on February 1, 1990 and on February 26, 1990, required Wausau, Petitioner herein, and respondents CIW Company, K & D Industrial Services, Inc., Group Eight Technology, Inc., and Howard O. Gabbert, Jr., to "complete emergency removal activities at the CIW Company site to abate a possible imminent and substantial endangerment to the public health and welfare of the environment arising from the actual or threatened release of hazardous substances".

6. Without admitting any of the Findings or Determinations contained in the Order, or any fact, responsibility, fault or liability in connection with the CIW Company site (the "CIW site"), Petitioner complied with the terms of the Order by performing the actions required by the Order, as further amended by an Emergency Response Action Plan ("ERAP") work plan submitted by Petitioner and approved by the USEPA.

7. Petitioner completed the on-site actions required by the Order, as amended by the USEPA-approved ERAP, on January 24, 1991 and, pursuant to the Order and the ERAP, submitted a Response Action Report ("RAR") (dated February 20, 1991) on February 21, 1991. The submittal of the RAR on February 21, 1991 completed the actions required under the Order, as amended. (A copy of the RAR (and Appendices) is attached hereto as Petitioner's Group Exhibit 1 and incorporated herein by reference. Also attached hereto as Petitioner's Exhibit 2, although incorporated by reference in the Order and the RAR, is a copy of the ERAP. A copy of the Order is included at Appendix A of the RAR or Petitioner's Group Exhibit 1.)

8. Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that it is not liable for response costs under Section 107(a) of CERCLA. Alternatively, Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that there are divisible and reasonable response costs forming a part of this Petition for which Petitioner is not liable under Section 107(a) of

CERCLA. Alternatively, Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that the naming of Wausau as a respondent and the response action ordered by the Order were unconstitutional, arbitrary and capricious, or were otherwise not in accordance with law. Alternatively, Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that there are divisible and reasonable response costs forming a part of this Petition for which the response action ordered by the Order was unconstitutional, arbitrary and capricious, or was otherwise not in accordance with law.

9. Petitioner requests reimbursement from the Fund for its reasonable response costs and submits that the response costs for which it seeks reimbursement are reasonable for performing the actions required by the Order, as further amended by the USEPA-approved ERAP. As set forth in Table 1 of the RAR (Petitioner's Group Exhibit 1), Petitioner has incurred \$2,196,976.43 in costs for contractors through January 31, 1991, of which \$2,195,998.05 are reasonable response costs for complying with the Order. Additional response costs for contractors and other reasonable response costs through February 21, 1991, if available, will be submitted for reimbursement from the Fund on or before April 22, 1991. Otherwise, additional response costs will be submitted seasonably for reimbursement from the Fund.

10. Petitioner hereby reserves the right to seasonably amend the Petition after the USEPA issues regulations and/or

guidance documents establishing procedures for petitioning for reimbursement from the Fund. Upon request, Petitioner will provide to USEPA further information considered necessary by USEPA to demonstrate Petitioner's right of reimbursement from the Fund.

II. FACTUAL BACKGROUND PRECEDING ISSUANCE

OF USEPA'S ORDER

1. Employers Insurance of Wausau ("Petitioner" or "Wausau") is a mutual company with its principal place of business in Wausau, Wisconsin. Petitioner is a person within the meaning of Section 101(21) of CERCLA.

2. In August, 1987 Group Eight Technology, Inc. ("Group Eight"), a named respondent to the Order, purchased property located at 2246 Third Street in Wyandotte, Michigan (the "Wyandotte site"). (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

3. On August 24, 1987 a building occupied by Group Eight at the Wyandotte site suffered a fire loss. (Finding No. 2 of the Order, and Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

4. Group Eight subsequently made a claim to Wausau for damages under a policy of insurance issued by Wausau Underwriters Insurance Company to Group Eight with an effective date of August 3, 1987. (Finding No. 3 of the Order, and Wausau Comments and

Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

5. Group Eight subsequently retained Marine Pollution Control of Detroit, Michigan to take samples of fluid contained in six (6) electrical transformers in service at the Wyandotte site prior to the fire. (CIW Site Administrative Record.)

6. Petitioner, through its representative, Howard Aidenbaum, a general adjustor employed by one of the Wausau Insurance Companies, advised Group Eight that sampling by Marine Pollution Control would be performed for the benefit of Group Eight prior to a determination of Wausau's obligations under the policy of insurance. Wausau's obligations under the policy of insurance were to reimburse Group Eight for covered losses and to pay, or guarantee payment, for the reasonable value of covered expenses in accordance with the terms and conditions of the insurance policy. (CIW Site Administrative Record, and Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

7. On September 3, 1987 Marine Pollution Control took samples from the fluids contained in six (6) electrical transformers at the Wyandotte site. (Finding No. 2 of the Order.) The six (6) electrical transformers were identified as three (3) Westinghouse Transformers and three (3) ST Transformers. (CIW Site Administrative Record.) On September 9, 1987 Marine Pollution Control, through Environmental Quality Laboratories, Inc., reported that the highest level of

concentration for polychlorinated biphenyls (PCBs) in any of the six (6) was 2.7 parts per million (ppm). (Finding No. 2 of the Order.)

8. In October, 1987 Group Eight solicited a bid from Sclafani Trucking, Inc. ("Sclafani Trucking") for the performance of demolition work at the Wyandotte site. (Finding No. 8 of the Order.) By correspondence dated November 1, 1987 Sclafani Trucking submitted a written proposal for demolition work at the Wyandotte site. Prior to November 1, 1987 Wausau had no knowledge of or relationship with Sclafani Trucking. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

9. By correspondence dated November 13, 1987 Wausau informed Sclafani Trucking that Wausau did not retain Sclafani Trucking, but that Wausau would guarantee payment for Sclafani Trucking's reasonable services as set forth in Sclafani Trucking's November 1, 1987 proposal to Group Eight. On November 30, 1987 Wausau also informed Group Eight that Wausau did not retain Sclafani Trucking, but that Wausau had agreed to pay a dollar amount to Sclafani Trucking for demolition work. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

10. In November, 1987 Sclafani Trucking informed Group Eight that seven (7) electrical transformers were located at the Wyandotte site. (Finding No. 10 of the Order.) The seventh electrical transformer, identified as a Niagra Transformer, was

never in service at the Wyandotte site. Marine Pollution Control had not taken a sample of the transformer fluids contained in the seventh transformer, manufactured by Niagara Transformer (the "Niagra Transformer"). (CIW Site Administrative Record.)

11. On December 1, 1987 Group Eight informed Sclafani Trucking that PCBs were not present in the electrical transformers at the Wyandotte site and that Sclafani Trucking could dispose of the transformers according to arrangements made by Sclafani Trucking. (Finding No. 11 of the Order.)

12. By correspondence dated December 15, 1987 Sclafani Trucking informed Wausau that Sclafani Trucking would arrange as part of the demolition work for the disposal of some of the electrical transformers at the Wyandotte site that had tested negative for PCBs. Additionally, Sclafani Trucking further informed Wausau that Sclafani Trucking would arrange to have the remaining transformers on the Wyandotte site tested and then arrange for disposal. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

13. Subsequent to December 15, 1987 Group Eight informed Wausau that Group Eight and Sclafani Trucking would arrange for the removal, transport and disposal or treatment of the electrical transformers and the transformer fluids at the Wyandotte site. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

14. In May, 1988 Group Eight and Sclafani Trucking discussed the testing, removal, transport and disposal or

treatment of transformer fluids and plating liquids at and from the Wyandotte site. In May or June 1988, Mr. A. Sclafani of Sclafani Trucking contacted his neighbor, Michael Van Hook, an employee of K & D Industrial Services, Inc. ("K & D") regarding the removal and transport of transformer fluids and plating liquids from the Wyandotte site. (CIW Site Administrative Record.)

15. On January 10, 1989 an inspector with the City of Wyandotte inspected the Wyandotte site and thereafter contacted the Michigan Department of Natural Resources ("MDNR") to advise the MDNR of the presence of electrical transformers and transformer fluids at the Wyandotte site. (CIW Site Administrative Record.)

16. On January 11, 1989 an inspector with the MDNR inspected the Wyandotte site with Group Eight and observed and reported the presence of seven (7) electrical transformers at the Wyandotte site, including the Niagra Transformer. (CIW Site Administrative Record.) The Niagra Transformer was not placarded as a PCB Transformer at the time of the inspection (CIW Site Administrative Record) nor did the City of Wyandotte, the MDNR, Group Eight or Sclafani Trucking placard the Niagra Transformer at any time.

17. On February 1, 1989 Sclafani Trucking and K & D met to again discuss the removal and transport of transformer fluids, plating liquids and press pit liquids from the Wyandotte site. (Finding No. 14 of the Order.)

18. On February 8, 1989 Mr. Aidenbaum of Wausau met with Mr. A. Sclafani of Sclafani Trucking and Mr. Van Hook of K & D regarding the removal and transport of transformer fluids from the Wyandotte site. Mr. Aidenbaum of Wausau was informed that K & D was being considered by Group Eight and Sclafani Trucking to arrange for the removal, transport and disposal or treatment of the transformer fluids. Mr. Aidenbaum requested K & D to provide a cost estimate for the removal, transport and disposal or treatment of the transformer fluids at the Wyandotte site prior to performing the work. Mr. Aidenbaum of Wausau did not discuss potential disposal or treatment sites for the transformer fluids nor did Mr. Aidenbaum arrange for or select a disposal or treatment site or direct that the transformer fluids should be removed to any particular site. Prior to February 8, 1989 Wausau had no knowledge of or relationship with K & D. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

19. On February 21, 1989 K & D submitted a proposal to Group Eight and Sclafani Trucking for the draining, removal, transport and disposal or treatment of transformer fluids from six (6) transformers at the Wyandotte site. The proposal identified one (1) disposal or treatment site for the transformer fluids and stated that the transformer fluids would be taken by K & D to the CIW site in Romulus, Michigan. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

20. By correspondence dated March 20, 1989 from the USEPA to Group Eight, the USEPA confirmed a telephone conversation with Group Eight informing Group Eight of the presence of six (6) mineral oil transformers at the Wyandotte site and of a seventh PCB Transformer, the Niagra Transformer. On or about April 1, 1989 Group Eight obtained a USEPA identification number for the Wyandotte site. (CIW Site Administrative Record.)

21. On April 5, 1989 Mr. Aidenbaum of Wausau met with Mr. Sclafani of Sclafani Trucking and Mr. Van Hook of K & D. At that meeting, Mr. Aidenbaum of Wausau agreed to pay a reasonable dollar amount to K & D for the removal, transport and disposal or treatment of the transformer fluids as estimated by K & D in its February 21, 1989 proposal. Mr. Aidenbaum of Wausau did not arrange for or select a disposal or treatment site or direct that the transformer fluid be disposed of or treated at the CIW site, or at any other site. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

22. On April 15, 1989 K & D drained, mixed, otherwise commingled and removed 700 gallons of transformer fluids from all seven (7) electrical transformers, including the Niagra Transformer, despite having analytical data for only six (6) transformers (Finding No. 16. of the Order) and despite having bid for the draining, removal and transport and disposal or treatment of transformer fluids from only six (6) transformers. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

23. On April 15, 1989 K & D also transported the bulk transformer fluids from the Wyandotte site to the CIW site where CIW received and placed the bulk transformer fluids in its process tanks for recycling. (Finding No. 16 of the Order.) The MDNR manifest using Group Eight's USEPA identification number was prepared by K & D and signed by Mr. Sclafani of Sclafani Trucking. (Uniform Hazardous Waste Manifest at Appendix D of the RAR or Petitioner's Group Exhibit 1.) No influent testing was performed by CIW. (Sections 1.4.2. and 3.5. and Appendix J of the RAR or Petitioner's Group Exhibit 1.)

24. By correspondence dated April 17, 1989 K & D notified Sclafani Trucking that seven (7) transformers at the Wyandotte site had been drained and the transformer fluids had been transported by K & D to the CIW site. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

25. On or about April 21, 1989 in accordance with Wausau's agreement to pay K & D for the removal, transport and disposal or treatment of transformer fluids, Wausau received a bill from K & D for its services and on April 28, 1989 Wausau issued a check to pay the April 21, 1989 invoice from K & D. (Finding No. 4 of the Order, and Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

26. On May 17, 1989 a customer of CIW informed CIW that oil originating from the CIW facility contained PCB contamination. CIW then ceased recycling operations. (Finding Nos. 23 and 24 of

the Order.)

27. On May 24, 1989 CIW received analytical results from DiHydro Analytical Services located in Wayne, Michigan which indicated PCB contamination in several of CIW's process tanks within a diked area at CIW's facility. (Finding No. 27 of the Order.)

28. On September 7, 1989 CIW informed the USEPA and MDNR of its intention to abandon the CIW site effective September 14, 1989 and CIW subsequently abandoned its facility. (Finding No. 32 of the Order.)

29. On November 28, 1989 USEPA issued a CERCLA Section 106(a) Administrative Order, Docket No. V-W-89-C-039, as amended on February 1, 1990 and on February 26, 1990, naming CIW, K & D, Group Eight, Gabbert and Wausau as respondents.

III. USEPA'S ORDER AND PETITIONER'S COMPLIANCE

1. - 2. The Order issued by the USEPA on November 28, 1989 ordered all respondents including respondent Wausau, Petitioner herein, to undertake certain actions, Order Nos. 1-6, as set forth in paragraphs 1 - 6 at pages 7 and 8 of the Order. Order Nos. 1 and 2 required:

"1. Within five (5) calendar days after the effective date of this Order, the Respondents shall submit to USEPA for approval, a Work Plan for the removal activities ordered as set forth in Paragraph 4 below. The Work Plan shall provide a concise description of the activities to be conducted to comply with the requirements of this Order. The Work Plan shall be

reviewed by USEPA, which may approve, disapprove, require revisions, or modify the Work Plan. Respondents shall implement the Work Plan as finally approved by USEPA. Once approved, the Work Plan shall be deemed to be incorporated into and fully enforceable part of this Order.

2. The Work Plan shall contain a site safety and health plan, a sampling and analysis plan, and a schedule of the work to be performed. The site safety and health plan shall be prepared in accordance with the Occupational Safety and Health Administration (OSHA) regulations applicable to Hazardous Waste Operations and Emergency Response, 29 CFR Part 1910. The Work Plan and other submitted documents shall demonstrate that the Respondent can properly conduct the actions required by this Order."

In response, Petitioner complied with the Order by submitting a work plan, entitled an Emergency Response Action Plan ("ERAP") (Petitioner's Exhibit 2) which contained a sampling and analysis plan, site safety and health plan and a project schedule descriptive of the work to be performed. The ERAP was submitted by Petitioner to the USEPA in accordance with the Order and formal approval was received from the USEPA by letter dated February 26, 1990. (Sections 1.1. and 1.2. and Appendix C of the RAR or Petitioner's Group Exhibit 1.)

3. Order No. 3 required:

"3. Respondents shall retain a contractor qualified to undertake and complete the requirements of this Order, and shall notify USEPA of the name of such contractor within three (3) days of the effective date of this Order. USEPA retains the right to disapprove of any, or all, of the contractors and/or subcontractors retained by the Respondents. In the event USEPA disapproves of a selected contractor, Respondents shall retain a different contractor to perform the work, and such selection shall be made within two (2) business days following USEPA's disapproval."

In response, Petitioner complied with the Order by submitting contractor notification to the USEPA by letters dated February 27, 1990 and May 25, 1990 for Phases I and II,

respectively. The USEPA's formal response to the notification was received from the USEPA by letter dated June 7, 1990. (Section 1.2. and Appendix C of the RAR or Petitioner's Group Exhibit 1.)

4. Order No. 4 required:

"4. Within two (2) calendar days after USEPA approval of the Work Plan, Respondents shall implement the Work Plan as approved or modified by USEPA. Failure of the Respondents to properly implement all aspects of the Work Plan shall be deemed to be a violation of the terms of this Order. The Work Plan shall require the Respondents to perform, and complete within twenty-five (25) calendar days after approval, at a minimum, the following removal activities.

- a. Provide site security and develop and implement a safety plan.
- b. Pump, treat, test, and discharge contaminated water as necessary.
- c. Pump and consolidate all contaminated oils and incinerate them off site.
- d. Pump out sludges and dispose of them properly.
- e. Excavate contaminated soils and dispose of them properly.
- f. Pump and treat liquids in the dikes on site. Decontaminate tanks, dikes, and all structures on site.
- g. Treat lagoon water and discharge.
- h. Sample, characterize, and dispose of drums of waste on site.
- i. Conduct post cleanup sampling."

In response, Petitioner complied with 4.a. of the Order by initiating site security on February 28, 1990. Further, the site safety plan as approved by USEPA was implemented in accordance with the USEPA-approved ERAP concurrently with implementation of the response action. (Sections 1.2. and 2.2.2. and Appendix E of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.b. of the Order by treating contaminated water on site with granular activated carbon in accordance with the Order and the ERAP.

Final effluent resulting from on site treatment was tested and then treated or disposed of at Safety-Kleen (East Chicago, Indiana) in accordance with USEPA authorization by letter dated July 16, 1990. (Sections 1.2., 4.3.3. and 4.4.5. and Appendices C, J and Q of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.c. of the Order by pumping, consolidating and subsequently incinerating contaminated oils at Chemical Waste Management's (CWM) Chemical Services, Inc. (Chicago, Illinois) or Rollins' Environmental Services, Inc. (Deerpark, Texas) incinerators in accordance with the Order, the ERAP and the USEPA authorization by letter dated July 7, 1990. (Sections 1.2., 4.4.1. and 4.4.3., Table 2 and Appendices C, J and O of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioners complied with 4.d. of the Order by pumping and/or removing sludges from storage vessels with hand tools and solidifying on site. Solidified sludges were disposed of at Chemical Waste Management's TSCA-compliant Landfill (Emelle, Alabama) in accordance with the Order, the ERAP and USEPA authorization by letter dated June 7, 1990. (Sections 1.2. and 4.5., Table 2 and Appendices C, J and R of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.e. of the Order by excavating and disposing of contaminated soils (total polychlorinated biphenyl concentrations at, or exceeding, 10 ppm pursuant to the USEPA-approved ERAP) at Chemical Waste

Management's TSCA-compliant Landfill (Emelle, Alabama) in accordance with the Order, the ERAP and USEPA authorization by letter dated June 7, 1990. (Sections 1.2., 4.8.1., 4.8.3. and 4.9. and Appendices C, J and R of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.f. of the Order as liquids contained within the on site dikes were either treated in the same manner as identified under 4.b.(aqueous liquids) or 4.c.(organic phase liquids). Tanks, dikes and structures were either decontaminated or removed in accordance with the Order, the ERAP and with USEPA authorization. (Sections 1.2., 4.4.1, 4.4.5., 4.6.1., 4.6.2., 4.7., 4.8.3. and Appendices J, O, Q and R of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.g. of the Order by sampling and analyzing pond waters from the two ponds located on site for PCB's in accordance with the Order and the ERAP. Sampling results indicated no detectable levels of PCB's. The ponded water, therefore, did not require treatment and disposal. Sampling results were forwarded to the USEPA by letter dated July 9, 1990. In addition, during the majority of the on-site phase removal activities, ponded water was not present in the off-site lagoon area located immediately east of the on site laboratory; therefore, water samples were not collected from the lagoon. However, sediment samples that were collected from the sediment existing at the base of the lagoon did not exhibit detectable PCB concentrations. (Sections 1.2., 4.4.5. and 4.8.2.

and Appendices C and J of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.h. of the Order by sampling and characterizing drummed and containerized materials in accordance with the Order and the USEPA-approved ERAP. TSCA and RCRA-characteristic drummed and containerized wastes were disposed of in accordance with federal and state regulations, as authorized by USEPA, at CWM Chemical Services, CWM's Trade Waste Incineration (Sauget, Illinois) incinerator and CWM's Chemical Waste Landfill (Emelle, Alabama). Formal authorization from USEPA was received by letter dated June 7, 1990. (Sections 1.2., 3.1., 3.2., 3.3., 3.3.1, 3.3.2., 3.3.3., 4.10., 4.12., 4.12.1., 4.12.2. and 4.12.3. and Appendices C and J of the RAR or Petitioner's Group Exhibit 1.)

In further response, Petitioner complied with 4.i. of the Order as post-cleanup sampling, in accordance with the Order and the ERAP, was completed following cessation of surface removal activities.

(Sections 1.2., 4.8.1., 4.8.2. and 4.8.3. and Appendix J of the RAR or Petitioner's Group Exhibit 1.)

5. Order No. 5 required:

"5. All materials containing hazardous substances, pollutants or contaminants removed pursuant to the Order shall be disposed of or treated at a facility approved by the On-Scene Coordinator and in accordance with the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. Section 9601, et seq., as amended, the USEPA Revised Off-Site Policy, and all other applicable Federal, State, and local requirements."

In response, Petitioner complied with the Order by disposing

or treating materials containing hazardous substances, pollutants or contaminants at facilities approved by USEPA's On-Scene Coordinator (OSC). (Sections 1.2., 4.3.3., 4.4.5., 4.9., 4.10., 4.11., 4.12., 4.12.1, 4.12.2. and 4.12.3. and Appendices C, O, P, Q, R, S and T of the RAR or Petitioner's Group Exhibit 1.)

6. Order No. 6 required:

"6. On or before the effective date of this Order, the Respondents shall designate a Project Coordinator. To the greatest extent possible, the Project Coordinator shall be present on site or readily available during site work. The USEPA has designated P.C. Lall of the Emergency and Enforcement Response Branch, Section 1, as its On-Site Coordinator and the Project Coordinator shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communication between the Respondents and the USEPA, and all documents, reports and approvals, and all other correspondence concerning the activities relevant to this Order, shall be directed through the On-Scene Coordinator and the Project Coordinator."

In response, Petitioner complied with the Order by designating a project coordinator within the time frames agreed to by USEPA. Formal notification to the USEPA was provided by letter dated February 27, 1990. (Section 1.2. and Appendix C of the RAR or Petitioner's Group Exhibit 1.)

7. Petitioner completed the CIW site actions required by the Order, as amended by the USEPA-approved ERAP, on January 24, 1991 and, pursuant to the Order and the ERAP, submitted a Response Action Report ("RAR") (dated February 20, 1991) on February 21, 1991. The submittal of the RAR on February 21, 1991 completed the actions required under the Order, as amended.

IV. PETITIONER IS NOT LIABLE UNDER SECTION 107(a)
FOR RESPONSE COSTS INCURRED IN COMPLYING WITH
USEPA'S ORDER

1. Under CERCLA, several classes of parties may be liable for response costs at a facility from which there has been a release or threatened release of a hazardous substance. These include the current owners or operators of a facility, Section 107(a)(1) of CERCLA; persons who owned or operated the facility at the time the hazardous substances were disposed, Section 107(a)(2) of CERCLA; persons who generated or arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, Section 107(a)(3) of CERCLA; and any person who accepts or accepted any hazardous substances for transport to the facility for disposal or treatment at sites selected by such person, Section 107(a)(4) of CERCLA.

2. The Order issued by the USEPA on November 28, 1989 determined, under Determination No. 3, that CIW Company ("CIW") is the present owner and operator of the CIW site.

3. The Order, as amended on February 26, 1990, determined, under Determination No. 3, that Howard O. Gabbert, Jr. ("Gabbert") is the present owner and operator of the CIW site.

4. The Order determined, under Determination No. 3., that

Group Eight is a generator having arranged for disposal or transport for disposal or treatment of hazardous substances.

5. The Order determined, under Determination No. 3., that K & D is a generator having arranged for disposal or transport for disposal or treatment of hazardous substances. Further, under the Administrative Record, K & D is a transporter who accepted for transport hazardous substances for disposal or treatment at a site, the CIW site, selected by K & D.

6. The Order also determined, under Determination No. 3., that Wausau, Petitioner herein, arranged for disposal or transport for disposal or treatment of hazardous substances.

7. As such, the only basis for Wausau, Petitioner herein, being a responsible party would be a claim by USEPA under Section 107(a)(3) of CERCLA that Wausau (1) "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances" and that the hazardous substances were (2) "owned or possessed by [Wausau]".

8. Findings Nos. 1 through 33 of the Order demonstrate that no Findings were made by the USEPA that Petitioner (1) generated or otherwise "arranged for disposal" of a hazardous substance that was (2) "owned or possessed" by Petitioner. Only under Finding No. 15. does the Order make the conclusory statement that Petitioner, through its representative, Mr. Aidenbaum, "directed that the waste oil was to be sent to the CIW Company (CIW) facility in Romulus, Michigan". Even assuming, arguendo, that "arranged" could be defined as "directed", no Finding was made

that hazardous substances were also "owned or possessed" by Petitioner.

9. Further, Determinations Nos. 1 through 3 of the Order demonstrate that no Determinations were made by the USEPA that Petitioner (1) generated or otherwise "arranged for disposal" of a hazardous substance that was (2) also "owned or possessed" by Petitioner. Only under Determination No. 3. does the Order make the conclusory statement that Petitioner "arranged for disposal or transport for disposal of hazardous substances" at the CIW Site. Even assuming, arguendo, that "arranged" could be defined as "directed", no Determination was made that hazardous substances were also "owned or possessed" by Petitioner.

10. To the contrary, Petitioner did not "arrange" for the disposal or treatment, or for the transport for disposal or treatment, of hazardous substances from the Wyandotte site to the CIW site. Neither the word "arrange" nor the term "arranged for" are defined in CERCLA, but according to Webster's New World Dictionary of the American Language (2nd edition), the word "arrange" means "to come to an agreement" or "to make plans". In arranging some action, a person must purposely intend to bring about a result. The only result that Petitioner intended to bring about at the Wyandotte site was to pay for the reasonable value of expenses associated with covered losses under an insurance policy issued to Group Eight. (Wausau Comments and Aidenbaum Affidavit at Appendix B to the RAR or Petitioner's Group Exhibit 1.) Evidently, the USEPA chose to ignore that the

Van Hook Affidavit and the Sclafani Affidavit (CIW Site Administrative Record) conflict in material respects and, for example, that A. Sclafani stated that "choosing the disposal location was the generator's responsibility". A contract of insurance to pay for the reasonable value of expenses associated with covered losses under an insurance policy does not constitute an "arrangement" by Wausau for disposal or treatment of hazardous substances.

11. Further, and again while no Findings or Determinations were made by USEPA that Petitioner "owned or possessed" hazardous substances, the Order demonstrates that Group Eight generated and owned the transformer fluids, that Sclafani Trucking executed the Uniform Hazardous Waste Manifest under the generator's certification (Appendix D of the RAR or Petitioner's Group Exhibit 1.), and that K & D also generated, owned or possessed and transported the transformer fluids on April 15, 1989. Again, by contrast, the only purpose for Wausau of the meetings between Wausau, K & D and Sclafani was to reach an agreed price with K & D as Wausau did not have the authority to control the removal, transport or disposal or treatment of the transformer fluids. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.)

12. Based upon the foregoing, Petitioner submits that it is not a person responsible under Section 107(a) of CERCLA, that it has complied with the terms of the Order and Petitioner is therefore entitled to reimbursement of reasonable response costs

from the Fund pursuant to Section 106(b)(2)(A) and (C) of CERCLA.

13. In addition to the foregoing, Finding No. 16 of the Order states that 700 bulk gallons of transformer fluids were transported from the Wyandotte site to the CIW site where CIW received and placed the bulk transformer fluids in its process tank(s) for recycling. (Appendix D of the RAR or Petitioner's Group Exhibit 1.) No drums were transported to the CIW site from the Wyandotte site. (Wausau Comments and CIW Site Administrative Record.)

14. The Order, under Order No. 4.h., required Petitioner to "sample, characterize and dispose of drums of waste on site". Under Order No. 4.a. the Petitioner was also required to "provide site security" for the site, including any drums on Site

15. In response, Petitioner complied with 4.h. of the Order and the USEPA-approved ERAP by constructing a drum and container staging area and by sampling, characterizing and disposing of drummed and containerized materials in accordance with the Order, the USEPA-approved ERAP, and federal and state regulations.

16. Since no drums or containerized materials were transported from the Wyandotte site to the CIW site, the drummed and containerized materials work required of the Petitioner by the USEPA under the Order and the ERAP was necessitated solely by the presence of drummed and containerized materials not attributable to the Petitioner, including non-PCB materials.

17. In further compliance with the Order, Petitioner also secured, sampled, characterized and/or disposed of other

materials not attributable to the 700 bulk gallons of transformer fluids, including but not limited to, retained oil samples, tankers and non-PCB bulk materials, underground storage tanks and other tanks, ponds, lagoons, and off-site materials for on-site restaging.

18. Since only bulk liquids were transported from the Wyandotte site to the CIW site, this work (Paragraph 17, Section IV of the Petition) and other work required of the Petitioner by the USEPA under the Order and the ERAP was necessitated solely by the presence of materials not attributable to the Petitioner, including non-PCB materials.

19. Based upon the foregoing, Petitioner submits that it is not a person responsible under Section 107(a) of CERCLA, that it has complied with the terms of the Order and Petitioner is therefore entitled to reimbursement of divisible and reasonable response costs from the Fund pursuant to Section 106(b)(2)(A) and (C) of CERCLA.

V. USEPA'S ORDER WAS UNCONSTITUTIONAL, ARBITRARY AND CAPRICIOUS, OR WAS OTHERWISE NOT IN ACCORDANCE WITH LAW

1. CERCLA gives the USEPA broad authority to respond to releases of hazardous substances under Section 104 and to seek recovery for USEPA's response costs under Section 107. To trigger the USEPA's authority to initiate a response action under Section 104, there need only be a "release" of a hazardous

substance, Section 104(a)(1) of CERCLA. As long as the USEPA's response meets the requirements of the National Contingency Plan (NCP), the USEPA has authority under Section 107 to recoup its response costs against liable parties. However, a party liable for response costs under Section 107 of CERCLA can never be liable for anything other than the response costs actually incurred. There are no fines or treble damages.

2. The Section 106 regime is entirely different and much harsher. A party who fails to comply with a Section 106 Order is subject to fines of up to \$25,000.00 per day and triple the value of the response costs as "punitive" damages, Section 106(b)(1) and 107(c)(3) of CERCLA. Quite properly, the threshold for triggering such draconian liabilities under Section 106 is higher than the threshold for triggering Section 104 and Section 107 actions. Under Section 106 of CERCLA, the USEPA must first "determine" that there may be "an imminent and substantial endangerment" before it can issue an order.

3. The distinction between Section 106 and Sections 104 and 107 indicates that there must be a significant distinction between the type of risk that warrants the issuance of a unilateral Section 106 Order with its "punitive" damage provisions.

4. The USEPA's guidance documents acknowledge the distinction:

First, of course, the agency must meet the legal threshold that an imminent and substantial endangerment to public health or the environment may exist. The

agency must be able to properly document and justify both its assertion that an immediate and significant risk of harm to human health or to the environment exists and its choice of the ultimate response action at a site in order to be able to oppose a challenge to the order and to successfully litigate any subsequent cost of recovery action.

USEPA Guidance Memorandum On Issuance of Administrative Orders For Immediate Removal Action, February 21, 1984, from Lee M. Thomas, Assistant Administrator, to Regional Administrators.

5. Petitioner submits that USEPA's decision, Findings and Determinations in naming Wausau, Petitioner herein, as a named respondent and in selecting the response action ordered by the USEPA was unconstitutional, arbitrary and capricious, or was otherwise not in accordance with law.

6. Petitioner further submits that there is nothing in the Administrative Record to document how the CIW site can be distinguished as more dangerous than many of the thousands of sites throughout the United States to which the USEPA is responding to under Section 104 and Section 107.

7. Although the CIW site Administrative Record contains some site assessment and liability information, the USEPA neglected to conduct an adequate preliminary assessment or to evaluate the documents, information and data collected in the logical, coherent manner that would be required for a reviewing court to discern and provide meaningful review of the conclusory statements under Determination Nos. 3. and 6 of the Order that

Wausau "arranged for disposal" and that "the actual or threatened release of hazardous substances from the Facility may present an imminent and substantial endangerment to the public health, welfare, or the environment."

8. Petitioner submits that the USEPA's determinations of "imminent and substantial endangerment" under Determinations 8.a. and 8.b. of the Order were arbitrary and capricious, failed to comply with the NCP, were not supported by the Administrative Record, were factually incorrect, were otherwise in error, or were otherwise not in accordance with law.

9. Determination No. 8.a. of the Order states:

"8. The conditions present at the Facility constitute a threat to public health or welfare or the environment based upon consideration of the factors set forth in the NCP, Section 300.65(b)(2). These factors include but are not limited to, the following:

a. hazardous substances or pollutants or contaminants in drums, barrels, tanks or other bulk storage containers, that may pose a threat of release.

This factors is present at the Facility due to the existence of PCB contaminated oils and sludges in abandoned tanks and dikes, along with contaminated lagoons on site which pose a serious threat of release. In addition, waste in drums contains high levels of organic volatile compounds."

10. In response, Petitioner submits that the USEPA neglected to consider the climatic conditions and the physical state of potentially hazardous substances present as the CIW site when the Order was issued on November 28, 1989. (Wausau Comments at Appendix B of the BAR or Petitioner's Group Exhibit 1.)

Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

11. In response, Petitioner further submits that the USEPA arbitrarily and capriciously neglected to consider that the vast majority of tanks located on site (which contained detectable concentrations of PCBs) had a provision for secondary containment and were surrounded by a site security fence and locked gate. Specifically, seventeen (17) of the twenty (20) tanks which contained, or were assumed to contain, PCB-contaminated materials were underlain by a concrete spill containment pad and/or were surrounded by a concrete dike. In the event of a spill or leak from a tank, the release of potentially hazardous materials to the environment would be prevented. Of the three (3) tanks which did not have secondary containment but contained PCB-contaminated materials, only one tank, tank T031, contained a small volume (approximately 150 gallons) of liquids that contained PCBs exceeding 50 ppm. (Section 1.0. and 1.1. Table 2, and Appendix A of the RAR or Petitioner's Group Exhibit 1.) Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

12. In response, Petitioner further submits that while Determination 8.a. of the Order also states that "waste in drums

contains high levels of organic volatile compounds", the USEPA apparently made this determination based solely on measurements of vapors existing above open drums on site, using an HNU meter without the support of confirmatory testing. The USEPA's Action Memorandum (CIW Site Administrative Record) states "some open drums with volatile organics had HNU readings up to 200." The units of measurement corresponding to "readings of up to 200" are noted and, therefore, this statement is meaningless. If it is assumed that the units are "parts per million" the measurements of organic vapors collected from the drums is only useful to a very limited extent, and cannot reasonably be used as justification for Determination 8.a. of the Order that the drums contain "hazardous substances or pollutants or contaminants." Specifically, the USEPA has implied, based on "HNU readings of up to 200" that the drums contained noxious or toxic vapors, when in fact many commonly used non-hazardous materials, such as standard petroleum-based motor oils, fuels, and lubricants could also yield organic vapor measurements of several hundred parts per million. Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

13. In response, Petitioner further submits that based upon RCRA characterization analyses performed during the Phase II removal activities and on composite samples representative of many of the drums and containers, it was determined that only one

(1) of the composite samples, representative of only six (6) of the 123 identified drums and containers, contained a volatile organic compound at a concentration marginally exceeding the RCRA TCLP limit. Additionally, only three (3) drums contained detectable concentrations of PCBs. Of the three drums containing detectable concentrations of PCBs, drums number D055 and D057 did not exhibit PCBs exceeding the regulatory limit of 50 ppm. Drum D042 contained material contaminated with PCBs at a concentration of 58 ppm, however, the material consisted of gravel (solid material). (Sections 4.12.3, 4.12.2 and Appendices I and J of the RAR of Petitioner's Group Exhibit 1.) Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

14. In response, Petitioner further submits that pursuant to Order No. 4.g. of the Order, treatment and discharge of "lagoon water" on site was required. Although not stated in the Order, it is assumed that USEPA deemed the "lagoons" to contain "hazardous substances or pollutants or contaminants" based, apparently, on one sample identified by USEPA's TAT Contractor as "water from lagoon". The specific lagoon from which the water sample was collected was not identified, however, it is assumed that this sample was collected from the shallow pond area located immediately to the east of the CIW site laboratory. Based upon sediment sampling performed pursuant to the Order and the ERAP,

PCBs were not detected in any of the eight (8) sediment samples collected from the ponds or the lagoon area, nor were PCBs detected in any of the six (6) sediment samples collected from the ditch area extending along the southern portion of the operational area of the site. In addition, PCBs were not detected in water samples collected from the two ponds. Accordingly, on the basis of final monitoring data generated from analyses of the sediment and water samples, the presence of PCB contamination in any of the pond, lagoon or ditch areas has not been substantiated. (Section 1.0, 1.1, 4.8.2 and 4.4.5 and Appendixes A and J of the RAR or Petitioner's Group Exhibit 1.) Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

15. Determination No. 8.b. of the Order states:

"8. The conditions present at the Facility constitute a threat to public health or welfare or the environment based upon consideration of the factors set forth in the NCP, Section 300.65 (b)(2). These factors include but are not limited to, the following:

b. high levels of hazardous substances or pollutants or contaminants in soils largely at or near surface that may migrate;

This factor is present at the Facility due to the existence of swipe samples which contained up to 220 g/100 cm² [amended by the Second Amendment to the Administrative Order, dated February 1, 1990 to read "220 ug/100 cm²"] of PCB contamination (Toxic Substances Control Act guidance states that levels of 0.5 ug/100 cm² in high contact areas are permissible)."

16. In response, Petitioner submits that the USEPA, in order to support the determination made in Determination No. 8.b of the Order, reported the results of swipe samples. Swipe samples, however, provide an indication of surficial contamination of structures, not of bulk soils. In addition, over the duration of the Phase II removal activities, a total of sixty (60) investigatory samples were collected from in-situ soils on and adjacent to the CIW site. Of these samples, only three (3) samples exhibited concentrations of PCBs in excess of 10 ppm. Of these three (3) samples, the highest concentration of PCBs detected (43 ppm) was from a soil sample collected from an isolated area. A PCB concentration of 13 ppm was detected in another area located immediately to the east of the large diked containment area, and a PCB concentration of 26 ppm was detected in a sample collected from the base of the excavation following removal of underground tank T031. Of the remaining fifty seven (57) investigatory soil samples collected, only nine (9) of the samples contained detectable concentrations of PCBs, and all were less than 10 ppm. (Sections 1.0., 1.1., 4.8.1., 4.8.3. and 4.6.2. and Appendixes A and J of the RAR Petitioner's Group Exhibit 1.) Nevertheless, in the absence of any supporting data, the USEPA, concluded that "high levels of hazardous substances" were present at the CIW site or, by implication, that they were widely distributed. Therefore, the USEPA arbitrarily and capriciously determined that the CIW site presented an

imminent and substantial endangerment or constituted a threat to public health, welfare or the environment.

17. Petitioner further submits that in the context of PCB contamination, it is apparent that the USEPA misrepresented the potential threat to public health or the environment. In fact, contrary to the USEPA's determination, PCBs have an extremely low migratory potential in geologic media due to their high adsorptive capacity and hydrophobic character. PCBs are often viewed as relatively immobile when compared with other organic contaminants.

18. Based upon the foregoing, Petitioner submits that it has complied with the terms of the Order and is therefore entitled to reimbursement of reasonable response costs from the Fund pursuant to Section 106(b)(2)(D) of CERCLA based upon the arbitrary and capricious findings and determinations of USEPA, or findings and determinations otherwise not in accordance with law.

19. In addition to the foregoing, Finding No. 16 of the Order states that 700 bulk gallons of transformer fluids were transported from the Wyandotte site to the CIW site where CIW received and placed the bulk transformer fluids in its process tank(s) for recycling. (Appendix D of the RAR or Petitioner's Group Exhibit 1.) No drums were transported to the CIW Site from the Wyandotte site. (Wausau Comments and CIW Site Administrative Record.)

20. The Order, under Order No. 4.h., required Petitioner to "sample, characterize and dispose of drums of waste on site".

Under Order No. 4.a. the Petitioner was also required to "provide site security" for the site, including any drums on Site

21. In response, Petitioner complied with 4.h. of the Order and the USEPA-approved ERAP by constructing a drum and container staging area and by sampling, characterizing and disposing of drummed and containerized materials in accordance with the Order, the USEPA-approved ERAP, and federal and state regulations.

22. Since no drums or containerized materials were transported from the Wyandotte site to the CIW site, the drummed and containerized materials work required of the Petitioner by the USEPA under the Order and the ERAP was necessitated solely by the presence of drummed and containerized materials not attributable to the Petitioner, including non-PCB materials, and the USEPA therefore arbitrarily and capriciously ordered Wausua to comply with Order Nos. 4.a. and 4.b.

23. In further compliance with the Order, Petitioner also secured, sampled, characterized and/or disposed of other materials not attributable to the 700 bulk gallons of transformer fluids, including but not limited to, retained oil samples, tankers and non-PCB bulk materials, underground storage tanks and other tanks, ponds, lagoons, and off-site materials for on-site restaging.

24. Since only bulk liquids were transported from the Wyandotte site to the CIW site, this work (Paragraph 23, Section V of the Petition) and other work required of the Petitioner by the USEPA under the Order and the ERAP was necessitated solely by

the presence of materials not attributable to the Petitioner, including non-PCB materials and the USEPA therefore, arbitrarily and capriciously ordered Wausau to comply with other provisions of the Order and of Order No. 4.

25. Based upon the foregoing, Petitioner submits that it has complied with the terms of the Order and Petitioner is therefore entitled to reimbursement of divisible and reasonable response costs from the Fund pursuant to Section 106(b)(2)(D) based upon the arbitrary and capricious findings and determinations of USEPA, or findings and determinations otherwise not in accordance with law.

26. Petitioner further submits that the Order is unconstitutional, arbitrary and capricious, or otherwise not in accordance with law, or unenforceable because Petitioner was not afforded an adjudicative hearing on the issuance and applicability of the Section 106 Order to Wausau or on whether an "imminent and substantial endangerment" existed of the CIW site.

27. Petitioner further submits that the Order is arbitrary and capricious, otherwise not in accordance with law, or unenforceable because the Order was issued to multiple respondents to jointly perform work. Alternatively, Petitioner further submits that the USEPA acted arbitrarily and capriciously in not naming additional potentially responsible parties as respondents to the Order.

28. The CIW Site Administrative Record further contains Wausau's public Comments submitted on January 2, 1990, which

Comments and the Aidenbaum Affidavit are incorporated herein by reference. (Wausau Comments and Aidenbaum Affidavit at Appendix B of the RAR or Petitioner's Group Exhibit 1.) As evidenced by the Comments, subsequent to the USEPA's receipt of the Aidenbaum Affidavit and the Comments, the USEPA acted arbitrarily and capriciously in not modifying or amending the Order by deleting Wausau as a named respondent and by not withdrawing the Order based upon the showing by Wausau that an "imminent and substantial endangerment" did not exist at the CIW site.

29. Based upon all of the foregoing, even if Petitioner is a person responsible under Section 107(a) of CERCLA, Petitioner submits that it has complied with the terms of the Order and is entitled to reimbursement of reasonable response costs incurred by Petitioner from the Fund pursuant to Section 106(b)(2)(D) of CERCLA based upon the arbitrary and capricious findings and determinations of USEPA, or findings and determinations otherwise not in accordance with law. Alternatively, Petitioner submits that there are divisible and reasonable response costs incurred by Petitioner forming a part of this Petition for which the response action ordered was arbitrary and capricious, or was otherwise not in accordance with law.

**VI. THE COSTS INCURRED BY PETITIONER IN
COMPLYING WITH USEPA'S ORDER ARE REASONABLE**

1. Petitioner requests reimbursement from the Fund for its reasonable response costs pursuant to Section 106(b)(2)(A) and (C) of the CERCLA, or Section 106(b)(2)(D) of the CERCLA, and submits that the response costs for which it seeks reimbursement are reasonable for performing the actions required by the Order, as further amended by the USEPA-approved ERAP. As set forth in Table 1 of the RAR (Petitioner's Group Exhibit 1.), Petitioner has incurred \$2,196,976.43 in costs for contractors through January 31, 1991, of which \$2,195,998.05 are reasonable response costs for complying with the Order.

2. Additional response costs for contractors and other reasonable response costs through February 21, 1991, if available, will be submitted for reimbursement from the Fund on or before April 22, 1991. Otherwise, additional response costs will be submitted seasonably for reimbursement from the Fund.

VII. CONCLUSION

1. Section 106(b)(2)(A) and (C) establishes three (3) criteria that must be satisfied before a Petition for Reimbursement will be granted: (i) the Petitioner must have received and complied with the terms of any Order issued under Section 106(a) of CERCLA, Section 106(b)(2)(A); (ii) the Petitioner must establish by preponderance of the evidence that it is not liable under Section 107(a) of CERCLA, Section 106(b)(2)(C); and (iii) also by a preponderance of the evidence, the Petitioner must establish that the response costs for which

it seeks reimbursement are reasonable in light of the action required by the Order, Section 106(b)(2)(A) and (C).

2. Petitioner submits that it has satisfied the criteria under Section 106(b)(2)(A) and (C) of CERCLA by (i) complying with the terms of the Order, as amended on February 1, 1990 and on February 26, 1990, and as further amended by the USEPA-approved ERAP; (ii) by establishing that Petitioner is not a responsible person under Section 107(a) of CERCLA; and (iii) by establishing that the response costs for which Petitioner seeks reimbursement are reasonable.

3. Alternatively, under Section 106(b)(2)(A) and (C) of CERCLA Petitioner submits that there are divisible and reasonable response costs forming a part of this Petition for which Petitioner is not a responsible person under Section 107(a) of CERCLA.

4. Alternatively, Petitioner submits that it has satisfied the criteria under Section 106(b)(2)(D) of CERCLA by (i) complying with the terms of the Order, as amended on February 1, 1990 and on February 26, 1990, and as further amended by the USEPA-approved ERAP; (ii) by establishing that the response costs for which Petitioner seeks reimbursement are reasonable; and (iii) by establishing that the decision in naming Wausau as a respondent or in selecting the response action ordered was arbitrary and capricious, or was otherwise not in accordance with law.

5. Alternatively, under Section 106(b)(2)(D) of CERCLA

Petitioner submits that there are divisible and reasonable response costs incurred by Petitioner forming a part of this Petition for which the response action ordered was arbitrary and capricious, or was otherwise not in accordance with law.

6. Petitioner hereby reserves the right to seasonably amend the Petition after the USEPA issues regulations and/or guidance documents establishing procedures for petitioning for reimbursement from the Fund. Petitioner hereby petitions for and also reserves the right to request that additional documents be added to the Administrative Record.

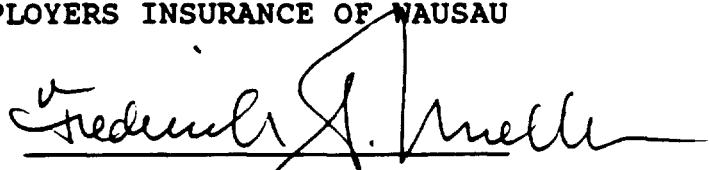
7. Petitioner hereby demands a hearing on this Petition for Reimbursement.

WHEREFORE, Petitioner respectfully demands a hearing and requests reimbursement from the Hazardous Substance Superfund for the reasonable response costs incurred by Petitioner in complying with the Administrative Order, Docket No. V-W-89-C-039, issued on November 28, 1989, as amended, plus interest, costs, fees and other expenses.

Respectfully submitted,

EMPLOYERS INSURANCE OF NAUSAU

by:



Frederick S. Mueller
Daniel A. DuPre
Joseph G. Lyons
Johnson & Bell, Ltd.
Suite 2200
222 N. LaSalle Street
Chicago, Illinois 60601
(312) 372-0770
(FAX) 372-9818

Dated: March 22, 1991